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No. 75-1497

In the Supreme Court of the United States

OCTOBER TERM, 1975

ACUPUNCTURE CENTER OF WASHINGTON, ET AL.,
PETITIONERS

v.

WILLIAM J. USERY, JR., SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not yet reported. The opinion of the district court (Pet. App. 20a-27a) is reported at 364 F. Supp. 1038.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1976. The petition for a writ of certiorari was filed on April 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Secretary of Labor properly denied an alien's application for labor certification under Section 212(a)(14) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182 (a)(14).

STATEMENT

1. Petitioner Yann Theresa Kao was admitted to the United States from Taiwan as a non-immigrant student in January 1970 (Pet. App. 20a-21a). After her graduation from Fort Hayes Kansas State College in May 1972 with a degree in Business Administration, petitioner Kao began working—contrary to the conditions of her student visa—as a Chinese-English interpreter for petitioner Acupuncture Center (Pet. App. 21a). In December 1972, petitioner Kao accompanied the Acupuncture Center when it moved from New York to Washington, D.C. (Pet. App. 21a, n. 3; App. 30).[1]

On January 22, 1973, petitioner Kao applied to the Secretary of Labor for the issuance of a labor certification under Section 212(a)(14) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. 1182(a)(14). This request for certification, which was necessary in order for petitioner Kao to obtain preferential immigrant status[2]

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[1]"App." refers to the appendix to the government's brief in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[2]Before an alien in the position of petitioner Kao may obtain preferential immigrant status for the purpose of employment, the Secretary of Labor must certify to the Secretary of State and the Attorney General, pursuant to Section 212(a)(14), that (A) "there are not sufficient workers in the United States who are able, willing, qualified, and available" for the job that the alien has been offered, and (B) the alien's employment "will not adversely affect the wages and working conditions" of similar workers in the United States.

The Secretary of Labor has delegated his power to issue labor certifications to the Office of the Manpower Administration for the area in which the employment is to occur. 29 C.F.R. 60.4(a). For aliens in the circumstances of petitioner, application must first be made to the State Employment Service, which evaluates the market for people qualified to fill the job in question; the State Employment Service forwards its report and information to the Office of Manpower Administration. 29 C.F.R. 60.3(c).

as a combination accountant, administrator, and interpreter of three Chinese dialects (App. 44-45), was supported by a "Job Offer for Alien Employment" form submitted by her employer, petitioner Acupuncture Center (App. 39). The job offer showed a need for a person with a college degree in accounting, two years of experience as a bilingual secretary, and an ability "to communicate in English and various dialects of Chinese" (App. 40).

The Manpower Administration certifying officer denied petitioner Kao's application on February 15, 1973, finding that the "available job market information will not warrant a certification of unavailability of workers in the United States" and that the job requirements listed by petitioner Acupuncture Center were unnecessarily restrictive (Pet. App. 22a). Petitioner Acupuncture Center requested reconsideration of the denial, offering to delete the requirement of accounting and bookkeeping skills and noting that it had unsuccessfully placed several advertisements in Chinese newspapers (Pet. App. 7a; App. 21). Petitioner further noted that it had turned down other job applicants who were not fluent in "Chinese, English, Mandarin, Cantonese and Shanghai dialects" or who did not possess an intimate knowledge of acupuncture terminology and practice (App. 29).

On March 8, 1973, the certifying officer's denial of certification was affirmed by the Acting Director of the Office of Employment Services of the District of Columbia Manpower Administration, who concluded that "resident workers were available to perform the required job duties" and that familiarity with acupuncture terminology and practice did not "appear to be a necessary occupational consideration and only impedes effective recruitment of an otherwise qualified local worker" (App. 26). The basis for the reviewing officer's belief that there were

resident workers available to perform the required duties was: (1) information from the legal counselor to two District of Columbia Chinese cultural associations, who indicated that many of the organizations' more than 600 members would be available for full-time employment as interpreters, that in excess of 15 of those members spoke various Chinese dialects, and that two individuals were immediately available, one of whom was fluent in Mandarin, Cantonese and Shanghai dialects (Pet. App. 8a-9a); (2) files of the D.C. Manpower Administration indicating the availability of four Chinese interpreters, including one who was fluent in both the Mandarin and Cantonese dialects (Pet. App. 9a); and (3) information from the State Department that two interpreters of Mandarin Chinese were available for employment (Pet. App. 9a). The reviewing officer also concluded that "the acquisition of specific technical [medical] jargon" was not essential in selecting applicants for petitioner Acupuncture Center's position because it was "a normal part of on-the-job training received on any job" (Pet. App. 10a).

2. On April 2, 1973, petitioners instituted this action in the United States District Court for the District of Columbia to review the decision of the Secretary of Labor not to issue a labor certification (App. 1-2). The district court ruled that the Secretary, acting through the Regional Manpower Administrator, had abused his discretion in denying the certification and remanded the case for further administrative proceedings (Pet. App. 20a-27a). Specifically, the court disagreed with the Secretary's determination that a knowledge of acupuncture medical terminology was not a necessary requirement for prospective job applicants and concluded that there had been an insufficient factual foundation laid to support a finding that there

were "able, willing, qualified, and available" resident workers.[3]

The court of appeals reversed (Pet. App. 1a-19a). Relying on its prior decision in *Pesikoff* v. *Secretary of Labor*, 501 F. 2d 757, certiorari denied, 419 U.S. 1038, which had been announced after the district court's decision, the court of appeals found that "the data before the Secretary indicated convincingly that the market was fully capable of supplying the need * * * that the Secretary deemed satisfactorily demonstrated" (Pet. App. 18a), and that the Secretary had not abused his discretion under the Act.

ARGUMENT

Petitioners do not dispute the court of appeals' statement (Pet. App. 19a, n. 96) that "Congress did not intend Section 212(a)(14) to create an employment placement office in the Department of Labor * * *." See *Pesikoff* v. *Secretary of Labor, supra*, 501 F. 2d at 764; *Digilab, Inc.* v. *Secretary of Labor*, 495 F. 2d 323, 326 (C.A. 1), certiorari denied, 419 U.S. 840. Nor do they question the court's conclusion (Pet. App.

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[3]We note that the district court may have lacked jurisdiction over this action. Petitioner's complaint (App. 2) states that jurisdiction was invoked under the Declaratory Judgment Act, 28 U.S.C. 2201, and the Administrative Procedure Act, 5 U.S.C. 701-706. But the Declaratory Judgment Act is not a grant of subject-matter jurisdiction to the courts, *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671-672, and the question whether the Administrative Procedure Act provides an independent basis for jurisdiction is presently before the Court in *Mathews* v. *Sanders*, No. 75-1443, certiorari granted, June 1, 1976. There is, however, no reason to hold this case pending the decision in *Mathews*, since petitioners were unsuccessful on the merits of the instant controversy after the courts below had erroneously proceeded as if jurisdiction had been properly alleged.

16a) that Section 212(a)(14) "establishes a presumption against admission of aliens for the purpose of performing labor." See *Pesikoff* v. *Secretary of Labor, supra,* 501 F. 2d at 761; *Seo* v. *United States Department of Labor,* 523 F. 2d 10, 13 (C.A. 9). Finally, petitioners agree (App. 5) that the decision whether to issue a labor certification is addressed to the sound discretion of the Secretary of Labor.

Petitioners' sole contention is that, in reviewing the Secretary's determination, the court of appeals applied a standard that conflicts with the approach taken in *Shuk Yee Chan* v. *Regional Manpower Administrator of the United States Department of Labor,* 521 F. 2d 592 (C.A. 7) and *Seo* v. *United States Department of Labor, supra.* Specifically, petitioners claim that the Secretary may not deny a labor certification in reliance upon information, no matter how credible, regarding the existence of a pool of potential workers who are "able, willing, qualified, and available" to fill the required position, but must actually find, even in the absence of contradictory evidence, that a specific person, acceptable to the employer, is available to do the job.[4] We submit that this contention is erroneous, that the decision of the court of appeals is not inconsistent with the holdings of other courts, and that the Secretary's essentially factual determination to withhold a labor certification from petitioner Kao does not warrant further review.

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[4]We note that the record in this case indicates that the Secretary may have met the standard petitioners propose, since he denied the labor certification in part upon information from the D.C. Chinese Cultural Association that a specific individual was actually "able, willing, qualified, and available" to satisfy petitioner Acupuncture Center's job description. See p. 4, *supra.*

Neither decision on which petitioners rely establishes that the Secretary is prohibited by Section 212(a)(14) from denying relief on the basis of reliable information showing a pool of available workers. In *Shuk Yee Chan* v. *Regional Manpower Administrator of the United States Department of Labor, supra,* for example, the court expressly concluded (521 F. 2d at 594) that the accuracy and reliability of the Illinois State Employment Service data on which the Secretary had exclusively relied was "shrouded in doubt." Furthermore, the Seventh Circuit cited with approval *Bitang* v. *Regional Manpower Administrator of the United States Department of Labor,* 351 F. Supp. 1342, 1345 (N.D. Ill.), in which the government had not disputed that the Illinois State Employment Service "accepts applicants' statements of qualification without verification, does not verify whether they are presently employed, and makes no effort to strike from the list of applicants the names of those persons who have found employment unless those persons request such action."[5] Against this background, the court of appeals was unwilling to approve "an administrative procedure which appears to have involved a perfunctory exercise of acquiescence in the statistical compilations of the state employment service" (521 F. 2d at 595).

Similarly, in *Seo* v. *United States Department of Labor, supra,* after expressly stating that it "agree[d] with the analysis of [Section 212(a)(14)] in *Pesikoff,*" the court of appeals upheld the reversal of the Secretary's denial of labor certification because he had relied solely upon an employment listing of the California Department of Human Resources Development that had been shown to be "unreliable" and had been "impeached" (523 F. 2d at 13).

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[5]The district court nevertheless noted that, despite these flaws, a group of 150 applicants would be "sufficiently substantial" to justify a denial of labor certification by the Secretary. 351 F. Supp. at 1345.

Cf. *Reddy, Inc.* v. *United States Department of Labor*, 492 F. 2d 538 (C.A. 5) and *Ratnayake* v. *Mack*, 499 F. 2d 1207 (C.A. 8) (denial of labor certification reversed where Secretary had referred to an incorrect class of workers).

Thus, *Shuk Yee Chan* and *Seo* merely reflect differing appraisals of the reliability of the state employment service data on which the Secretary's decision had been based, rather than a disagreement over the relevant statutory criteria that govern the Secretary's exercise of discretion.[6] Here, the Secretary expressly relied on a number of sources of employment information, none of which has been shown to be inappropriate or unreliable, and his reliance on those sources was reasoned rather than "a perfunctory exercise of acquiescence." The Secretary therefore did not abuse his discretion in denying relief.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]Moreover, in neither *Shuk Yee Chan* nor *Seo* had the Secretary concluded that the employer's job description was unduly narrow.

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